

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSE C.,

Plaintiff,

V.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C23-5655-SKV

ORDER REVERSING THE COMMISSIONER'S DECISION

Plaintiff seeks review of the denial of his application for Disability Insurance Benefits (DIB). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

Plaintiff was born in 1966, has a high school education, and has worked as a stevedoring/marine terminal superintendent, a shipping and receiving supervisor, a packing operation manager, a warehouse manager, and as a general construction superintendent. AR 28, 122, 200, 52-63. Plaintiff was last gainfully employed in June 2020. AR 184, 49, 97.

1 This case has a somewhat lengthy history. Plaintiff filed a prior claim for DIB on
2 September 7, 2016, after which an ALJ held a hearing and then found that Plaintiff was not
3 disabled on December 31, 2018. AR 113-24. Thereafter, Plaintiff filed the instant DIB
4 application on July 11, 2020, alleging disability as of June 28, 2020. AR 363-64. Plaintiff's
5 applications were denied initially and on reconsideration, and Plaintiff requested a hearing. AR
6 128-76. A new ALJ conducted a hearing on Plaintiff's 2020 DIB claim in September 2021, and,
7 on October 14, 2021, the ALJ issued a partially favorable decision. AR 36-93, 118-203. In his
8 October 2021 decision, the ALJ found that based on "new material evidence showing increased
9 severity of [Plaintiff's] physical impairments, as well as the existence of impairments not
10 considered in the prior decision," and a change in the agency's rules for evaluating
11 musculoskeletal impairments, Plaintiff had rebutted the presumption of ongoing non-disability
12 under *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988). AR 182. The ALJ subsequently
13 found that Plaintiff became disabled on May 19, 2021, when his age category changed, but that
14 he was not disabled from June 28, 2020, until May 19, 2021. AR 202.

15 On January 21, 2022, the Appeals Council affirmed in part the ALJ's October 2021
16 finding that Plaintiff became disabled as a result of advanced age. AR 213-14. However, the
17 Appeals Council concluded that the ALJ erred in finding Plaintiff disabled as a result of age
18 change in May 2021, because Plaintiff did not change age categories until August 19, 2021. AR
19 214. Accordingly, the Appeals Council concluded that Plaintiff was disabled beginning August
20 19, 2021 – not May 19, 2021. AR 214.

21 However, the Appeals Council also reversed and remanded the ALJ's October 2021
22 finding that Plaintiff was not disabled from June 2020, until the time when he changed age
23 categories in 2021. AR 213-15. Specifically, the Appeals Council found that the ALJ failed to

1 adequately evaluate the medical opinion evidence and to resolve discrepancies between the
 2 medical opinion evidence and Plaintiff's assessed RFC. AR 213-14. On remand, the Appeals
 3 Council ordered the ALJ to reevaluate the medical opinion evidence and to give "further
 4 consideration to the claimant's maximum [RFC] during the entire period at issue and provide [a]
 5 rationale with specific references to evidence of record in support of assessed limitations." AR
 6 214. The Appeals Council further noted that, on remand, the ALJ may expand the record to
 7 obtain additional medical source evidence, clarification of the existing medical opinion evidence,
 8 and that the ALJ should obtain additional VE testimony clarifying the "effect of the assessed
 9 limitations on the claimant's occupational base." AR 214. The Appeals Council ordered the
 10 ALJ to ensure that the VE hypothetical "reflect[s] the specific capacity/limitations established by
 11 the record as a whole," to "identify and resolve any conflicts between the occupational evidence
 12 provided by the [VE] and information in the . . . DOT. . . and SSR 00-4p," and to "ask the [VE]
 13 to identify examples of appropriate jobs and state the incidence of such jobs in the national
 14 economy." AR 214.

15 On remand, the same ALJ (who authored the October 2021 decision) held another
 16 hearing in January 2023, and, on February 27, 2023, the ALJ again found that Plaintiff was not
 17 disabled during the closed period at issue from June 28, 2020, through the date of his advanced
 18 age change in August 2021. AR 17-30, 96-105.

19 THE ALJ'S DECISION

20 In February 2023, the ALJ utilized the five-step disability evaluation process¹ and found
 21 as follows regarding the closed period from June 28, 2020, until August 19, 2021:

22 **Step one:** Plaintiff has not engaged in substantial gainful activity since June 28, 2020.
 23

¹ 20 C.F.R. § 404.1520.

Step two: Plaintiff has the following severe impairments: cervical spine degenerative disc disease and degenerative disc disease; major depressive disorder; post-traumatic stress disorder (“PTSD”); and alcohol dependence.

Step three: These impairments do not meet or equal the requirements of a listed impairment.²

Residual Functional Capacity: Plaintiff can perform light work with additional postural, environmental, mental, and social limitations.

Step four: Plaintiff cannot perform any of his past relevant work.

Step five: As there were jobs that existed in significant numbers in the national economy that Plaintiff could perform from June 2020-August 2021, including mail room clerk, marking clerk, and photocopy machine operator, Plaintiff was not disabled during the relevant closed period.

AR 17-30.

The Appeals Council denied Plaintiff's request for review of the ALJ's February 2023 decision, making the ALJ's decision the Commissioner's final decision. AR 1-6. Plaintiff appealed the final decision of the Commissioner to this Court. Dkt. 1.

LEGAL STANDARDS

Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of social security benefits when the ALJ’s findings are based on harmful legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a general principle, an ALJ’s error may be deemed harmless where it is “inconsequential to the ultimate nondisability determination.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) *superseded on other grounds by* 20 C.F.R. § 416.920(a) (cited sources omitted). The Court looks to “the record as a whole to determine whether the error alters the outcome of the case.” *Id.*

² 20 C.F.R. Part 404, Subpart P., App. 1.

1 Substantial evidence is “more than a mere scintilla. It means - and means only - such
 2 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
 3 *Biestek v. Berryhill*, 587 U.S. --, 139 S. Ct. 1148, 1154 (2019) (citations omitted); *Magallanes v.*
 4 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for evaluating symptom
 5 testimony, resolving conflicts in medical testimony, and resolving any other ambiguities that
 6 might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is
 7 required to examine the record as a whole, it may neither reweigh the evidence nor substitute its
 8 judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).
 9 When the evidence is susceptible to more than one rational interpretation, it is the
 10 Commissioner’s conclusion that must be upheld. *Id.*

11 DISCUSSION

12 Plaintiff argues the ALJ miscalculated his testimony and the medical opinion evidence.
 13 Dkt. 10. The Commissioner argues the ALJ’s decision is free of harmful legal error, supported
 14 by substantial evidence, and should be affirmed. Dkt. 13.

15 **A. The ALJ Erred in Evaluating the Medical Opinion Evidence.**

16 Under regulations applicable to this case, the ALJ is required to articulate the
 17 persuasiveness of each medical opinion, specifically with respect to whether the opinions are
 18 supported and consistent with the record. *See* 20 C.F.R. § 404.1520c(a)-(c). An ALJ’s
 19 consistency and supportability findings must be supported by substantial evidence. *See Woods v.*
 20 *Kijakazi*, 32 F.4th 785, 792 (9th Cir. 2022).

21 **1. Treating Physician, Dr. Ilya Golovaty**

22 In August 2021, Plaintiff’s treating physician, Dr. Golovaty, prepared a medical opinion
 23 in which he opined that Plaintiff was capable of light work but that due to Plaintiff’s “inability to

1 maintain exertional upper extremity and lower extremity demands,” Plaintiff would on average
 2 miss three days of work per month. AR 1823. The ALJ found Dr. Golovaty’s opinion “partially
 3 persuasive,” agreeing with and adopting a limitation to light work, but rejecting Dr. Golovaty’s
 4 opinion regarding Plaintiff’s “level of absenteeism.” AR 27. In support, the ALJ found that Dr.
 5 Golovaty’s absenteeism restriction was inconsistent “with any evidence of the record.” AR 27.
 6 Specifically, the ALJ pointed to Plaintiff’s “ability to perform his activities of daily living
 7 independently” and his “caregiving to his elderly in-laws.” AR 27.

8 Plaintiff argues that the ALJ’s reference to “any evidence of the record” was unduly
 9 vague, and the Court agrees. *See Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103
 10 (9th Cir. 2014) (“Although the ALJ’s analysis need not be extensive, the ALJ must provide some
 11 reasoning in order for us to meaningfully determine whether the ALJ’s conclusions were
 12 supported by substantial evidence.”); *see also Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th Cir.
 13 1991) (explaining that “a reviewing court should not be forced to speculate as to the grounds for
 14 an adjudicator’s rejection” of certain evidence). However, in accordance with *Kaufmann v.*
 15 *Kijakazi*, the Court has reviewed “the ALJ’s full explanation” for rejecting Dr. Golovaty’s
 16 opinion, “scrutiniz[ing] all of the pages of [the] ALJ’s decision.” 32 F.4th 843, 851 (9th Cir.
 17 2022). Notwithstanding, the ALJ’s reference to “any evidence of the record” as support for
 18 rejecting Dr. Golovaty’s absenteeism opinion remains too broad to be meaningful. AR 27.
 19 Neither *Kaufmann* nor any other Ninth Circuit precedent permit the Court to manufacture *post*
 20 *hoc* findings or support for such findings where none exists. *See Makenzie M. v. Comm’r of Soc.*
 21 *Sec.*, No. C22-5013-BAT, 2022 WL 2817086, at *1 (W.D. Wash. July 19, 2022) (rejecting
 22 similar argument regarding *Kaufmann*, and citing *Bray v. Comm’r of Social Sec. Admin.*, 554
 23 F.3d 1219, 1225-26 (9th Cir. 2009)) (court reviews ALJ’s decision “based on the reasoning and

1 factual findings offered by the ALJ – not *post hoc* rationalizations that attempt to intuit what the
 2 adjudicator may have been thinking”).

3 The Court thus turns to the additional reasons proffered by the ALJ for rejecting Dr.
 4 Golovaty’s opined absenteeism limitation: Plaintiff’s ADLs and his caregiving for elderly in-
 5 laws. AR 27. Plaintiff contends the ALJ erred in finding that he was in fact caring for his in-
 6 laws, arguing the record shows instead that he was barely caring for himself during the relevant
 7 period. Dkt. 14 at 6-7. Plaintiff further notes that the ALJ failed to explain what type of care
 8 Plaintiff was providing, and how any such care, in turn, undermined Dr. Golovaty’s opinion
 9 regarding his absenteeism. Dkt. 10 at 15-16. In terms of his ADLs, Plaintiff notes his testimony
 10 that he was unable to type, drive, cook, and/or lift anything heavy – all chores that his wife
 11 typically performed, in addition to doing Plaintiff’s laundry and grocery shopping for him. Dkt.
 12 10 at 11 (citing AR 66-72). The Commissioner counters with additional record evidence that she
 13 contends supports the ALJ’s findings. Dkt. 13 at 8.

14 The ALJ did not provide any record citations in support of his findings regarding
 15 Plaintiff’s ADLs and caregiving as they pertained to Dr. Golovaty’s opinion. AR 27. Thus, in
 16 accordance with *Kaufmann*, 32 F.4th at 851, the Court has again reviewed the reasons and
 17 supporting record evidence cited by the ALJ elsewhere in his decision. *See, e.g.*, AR 21 (ALJ’s
 18 step two analysis, citing AR 1003, 1263, 1388, 1540, and 1683, in support of Plaintiff’s ability to
 19 perform his ADLs independently, and citing AR 1247, 1288, 1295-96, and 1345, in support of
 20 Plaintiff’s alleged caregiving); *see also* AR 24 (ALJ’s evaluation of Plaintiff’s testimony). The
 21 ALJ cites July 2021 therapy records from Plaintiff’s and his wife’s couples counseling session.
 22 AR 21 (citing “C7F/111,” AR 1247). However, the ALJ misinterprets references from within
 23 those records regarding Plaintiff’s wife’s care for her parents (Plaintiff’s elderly in-laws),

1 incorrectly assuming that Plaintiff provided the care himself. AR 21 (citing AR 1247) (therapist
 2 notes that Plaintiff and his wife had separated “due to recent events associated with [Plaintiff’s]
 3 drinking and caregiving for his wife’s elderly parents” and that Plaintiff’s “wife [was] currently
 4 living with her son and parents in Southern [California]”); *see also* AR 77 (Plaintiff’s testimony
 5 in September 2021, that his in-laws lived in California, and that his wife periodically “goes down
 6 there” to check in on them). Moreover, the additional medical records cited by the ALJ
 7 regarding Plaintiff’s alleged caregiving also do not undermine Dr. Golovaty’s opinion regarding
 8 absenteeism, reflecting only that Plaintiff’s general “goal[s]” at the time were to “work[] on his
 9 relationship with his wife,” and “deal[] with elderly parents,” and that Plaintiff felt stressed, in
 10 part, due to unspecified “caregiving responsibilities.”³ AR 21 (citing AR 1247, 1288, 1295-96,
 11 1345).

12 Second, the ALJ’s cited record evidence regarding Plaintiff’s ADLs does not demonstrate
 13 a level of “independence” that undermines Dr. Golovaty’s opinion regarding Plaintiff’s
 14 absenteeism. AR 27; *see also* AR 21 (citing AR 1003, 1263, 1388, 1540, and 1683). Again, the
 15 evidence cited by the ALJ suggests that while Plaintiff was able to take care of his daily
 16 “grooming,” “toileting,” and “personal hygiene” needs, it was Plaintiff’s wife who completed all
 17 of the “housework,” including “cleaning, cooking, dishwashing, vacuuming, sweeping, and
 18 laundry.” *See* AR 21 (citing AR 1003). Moreover, even if Plaintiff’s ADLs were as stated by
 19 the ALJ, they nevertheless failed to provide substantial support for rejecting Dr. Golovaty’s
 20 opined limitation. “[T]he mere fact that a plaintiff has carried on certain daily activities, such as
 21 grocery shopping, driving a car, or limited walking for exercise, does not in any way detract

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 23 ³ The Court declines to consider the additional evidence and/or reasons proffered by the Commissioner in
 her opposition brief that were not in fact advanced by the ALJ. *See* Dkt. 13 at 7-8. The Court is required
 to review the ALJ’s decision “based on the reasoning and factual findings offered by the ALJ – not *post
 hoc* rationalizations.” *Bray*, 554 F.3d at 1225-26.

1 from [his] credibility as to [his] overall disability.” *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th
 2 Cir. 2001) (citations omitted); *see also Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)
 3 (citations omitted) (“disability claimants should not be penalized for attempting to lead normal
 4 lives in the face of their limitations”). “One does not need to be ‘utterly incapacitated’ in order
 5 to be disabled.” *Vertigan*, 260 F.3d at 1050 (citations omitted).

6 Accordingly, the ALJ erred in rejecting Dr. Golovaty’s opinion regarding Plaintiff’s
 7 likely absenteeism. The error was not harmless given the VE’s testimony that such a limitation
 8 would have rendered Plaintiff unable to sustain full-time, competitive employment. *See* AR 90-
 9 91.

10 **2. December 2020 and April 2021 Opinions from Non-**
11 Examining Physicians, Drs. Norman Staley and Christine Harmon

12 In December 2020 and April 2021, on initial review and reconsideration, respectively,
 13 consulting non-examining state agency physicians, Drs. Staley and Harmon, opined that Plaintiff
 14 was capable of light work with some additional limitations. AR 164-67, 138-41. At issue on
 15 appeal here are Drs. Staley’s and Harmon’s opinions regarding Plaintiff’s manipulative
 16 limitations. Dkt. 10 at 1, 3-11. Both physicians opined that Plaintiff was limited to occasional
 17 handling, fingering, and feeling with both of his hands due to a loss of sensation and feeling in
 18 them, but especially in his right hand. AR 165-66, 139, 141.

19 In the ALJ’s prior October 2021 decision, the same ALJ found Drs. Staley’s and
 20 Harmon’s opinions persuasive. AR 199. However, the ALJ declined to account for their opined
 21 manipulative limitations in Plaintiff’s RFC, and, as noted above, the Appeals Council reversed
 22 and remanded based largely on this very discrepancy. AR 213.

23 On remand at the January 2023 hearing, the ALJ confirmed with the VE that an RFC
 24 specifying an occasional handling and fingering limitation would render Plaintiff disabled for the

1 closed period at issue, given Plaintiff's advanced age. AR 103-05. In his February 2023
 2 decision, the ALJ subsequently downgraded his evaluation of Drs. Staley's and Harmon's
 3 opinions from "persuasive" to "somewhat persuasive," and rejected their opined manipulative
 4 limitations as "not consistent with [Plaintiff's] grip strength." AR 25; *cf.* AR 199. The ALJ then
 5 assessed Plaintiff with an RFC that permitted frequent, but not constant, handling, fingering, and
 6 feeling bilaterally. AR 22.

7 Plaintiff argues the ALJ mischaracterized the record evidence that he cited in support of
 8 his rejection of Drs. Staley's and Harmon's opined manipulative limitations, and that the ALJ
 9 also improperly substituted his interpretation of medical examination findings for those of the
 10 physicians.⁴ Dkt. 10 at 5-7. Plaintiff contends that the pain and lack of sensation in his hands
 11 was supported by specific evidence in the medical record, and that his grip strength was distinct
 12 from his symptoms of pain and numbness. Dkt. 10 at 8-10. Accordingly, Plaintiff argues the
 13 ALJ erred in relying solely on his grip strength in rejecting Drs. Harmon's and Staley's related
 14 opinions. Dkt. 10 at 8-10.

15 The Commissioner does not dispute that hand pain and lack of sensation are symptoms
 16 distinct from grip strength. Dkt. 13 at 6. Instead, the Commissioner argues that, under
 17 *Kaufmann*, the Court should again look elsewhere within the ALJ's decision for support for the
 18 ALJ's rejection of Drs. Harmon's and Staley's opinions regarding Plaintiff's manipulative
 19 limitations. Dkt. 13 at 6 (citing 32 F.4th at 851). In particular, the Commissioner notes that the
 20 ALJ previously found that Plaintiff's sensation was "intact" in rejecting Plaintiff's testimony.

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 22 ⁴ In support of the argument that the ALJ improperly substituted his own interpretation of Plaintiff's
 23 medical findings, Plaintiff points out that at the prior October 2021 hearing, the ALJ declined to include a
 manipulative limitation in his VE hypothetical, and, in support, speculated on the record that if a claimant
 were limited to occasional handling, then the claimant's "grip obviously is [also] extremely limited." AR
 90.

1 Dkt. 13 at 6 (citing AR 24, which, in turn, cites AR 2099, 2114). The Commissioner further
 2 argues that Plaintiff's challenge to the ALJ's evaluation of Drs. Staley's and Harmon's opinions
 3 fails because Plaintiff has simply offered an alternative interpretation of the record evidence.

4 Dkt. 13 at 7.

5 Here, Drs. Staley and Harmon relied on Plaintiff's lack of sensation, as opposed to his
 6 grip strength, in support of their opined manipulative limitations. AR 139, 141, 165-66. The
 7 ALJ's reliance on Dr. Wingfield's November 2020 examination finding regarding Plaintiff's grip
 8 strength in rejecting Drs. Staley's and Harmon's opined limitations was off target for several
 9 reasons. AR 25 (citing AR 1006, Dr. Wingfield's examination finding that Plaintiff possessed
 10 "5/5" grip strength). First, it ignored entirely the more pertinent observations from Dr.
 11 Wingfield's very examination regarding Plaintiff's lack of sensation. *See* AR 25. In particular,
 12 Dr. Wingfield observed upon neurological examination that Plaintiff had "no sensation to deep
 13 and light touch at the first, second, and third fingers on both hands," and subsequently opined
 14 that Plaintiff was limited in his handling and fingering due to this lack sensation and numbness.
 15 AR 1006-07. Thus, Dr. Wingfield's examination suggested that Plaintiff could possess intact
 16 grip strength while, simultaneously, experiencing numbness and a lack of sensation in his hands.
 17 AR 1005-06. Furthermore, contrary to the ALJ's finding otherwise, Dr. Wingfield's
 18 examination results and opinion regarding Plaintiff's numbness mirrored – rather than
 19 undermined – Drs. Harmon's and Staley's own opinions regarding manipulative limitations.⁵
 20 *See* AR 166 (Dr. Harmon opines that Plaintiff's "[h]andl[ing]/fingering/feeling [is] limited to

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23 ⁵ The ALJ's reliance on Dr. Wingfield's examination as the sole reason for rejecting Drs. Harmon's and Staley's opined manipulative limitations is also notable in that it ignores the ALJ's subsequent rejection of Dr. Wingfield's own opinion as "not persuasive." *See* AR 25.

1 occasional on both hands due to decreased feeling/sensation"); AR 141 (Dr. Staley makes
 2 identical finding).

3 Moreover, having again "scrutinized all of the pages of [the] ALJ's decision," the ALJ's
 4 findings elsewhere in his decision regarding Plaintiff's intact sensation and use of his upper
 5 extremities, fail to provide substantial evidence in support of the ALJ's rejection of Drs.
 6 Harmon's and Staley's opinions regarding Plaintiff's manipulative limitations.⁶ *See Kaufmann*,
 7 32 F.4th at 851; *see also* AR 21 (ALJ's step two findings regarding Plaintiff's upper extremities
 8 and supporting citations to AR 1005, 1108, 1247, 1263, 1288, 1295-96, 1376, 1625, 1665, and
 9 1683); AR 24 (citing AR 2099 and 2114, in finding Plaintiff's sensation was "intact"); AR 25
 10 (citing AR 1005). In support of his finding that Plaintiff's sensation was "intact," the ALJ
 11 cherry-picked two notations from Plaintiff's treatment for alcohol withdrawal and rehabilitation
 12 from December 2021 and February 2022, both of which post-dated the relevant, closed period in
 13 this case (June 28, 2020, through August 19, 2021) and likewise failed to undermine Drs.
 14 Harmon's and Staley's opinions.⁷ AR 24 (citing AR 2099, 2114); *see* Dkt. 14 at 4-5. Moreover,
 15 as Plaintiff notes, numerous medical records in fact supported Drs. Staley's and Harmon's
 16 opinions regarding Plaintiff's sensation and numbness, including an MRI and follow-up
 17 examination that showed "chronic [bilateral upper extremity] pain and hand numbness,"
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19 ⁶ Again, the Commissioner provides additional *post hoc* reasons and record citations not offered by the
 20 ALJ, which the Court may not consider. *See Bray*, 554 F.3d at 1225-26; *see* Dkt. 13 at 6-7.

21 ⁷ In February 2022, Plaintiff was undergoing occupational therapy while in the hospital for alcohol
 22 withdrawal. AR 2099. The occupational therapist observed "intact light touch as evidenced by gross
 23 assessment," along with some difficulty fastening buttons and "reduced strength, balance, endurance, and
 executive functioning." AR 2099. In December 2021, Plaintiff was seen by a physician for "chronic
 progressive bilateral tingling pain." AR 2114. The physician noted during an examination that Plaintiff
 had "intact sensation," yet diagnosed "ulnar neuropathy at the left elbow," and suggested that Plaintiff's
 complaints of extremity numbness, tingling, and pain appeared "consistent with an inflammatory
 polyarthralgia" and suggested "further workup to rule out reversible causes of peripheral
 polyneuropathy." AR 2114-15.

1 Plaintiff's participation in a pain treatment program, Plaintiff's consultation with a hand
 2 therapist, and records from his treating physician, Dr. Golovaty. *See* Dkt. 10 at 14-16; *see also*
 3 AR 1675, 1802, 1672, 1219, 1988, 1939-42. The ALJ, however, failed to address any of those
 4 records, and thus impermissibly cited only to portions of the record consistent with his
 5 conclusion. *See* AR 25. In doing so, the ALJ also ignored evidence that Plaintiff's hand pain
 6 and numbness waxed and waned over time. *See Schiaffino v. Saul*, 799 F. App'x 473, 475 (9th
 7 Cir. 2020) (quoting *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014)) (noting that "the fact
 8 that 'symptoms wax and wane in the course of treatment' is to be expected," and "does not create
 9 an inconsistency" sufficient to reject medical opinion evidence).

10 The ALJ's evaluation of Dr. Harmon's and Staley's opinion regarding manipulative
 11 limitations was not supported by substantial evidence. Because the error infected the ALJ's RFC
 12 assessment and his findings at step five, it was not harmless. *See* AR 103-05.

13 **B. The ALJ Did Not Err in Evaluating Plaintiff's Testimony Regarding Hand
 14 Pain and Numbness.**

15 Plaintiff's challenge is limited to the ALJ's rejection of his testimony regarding his hand
 16 pain and numbness.⁸ Dkt. 10 at 1-2, 11-14.

17 Plaintiff testified regarding his hand pain and numbness in an April 2021 function report
 18 and at the September 2021 hearing. AR 478-84 (2021 function report); AR 63-78. Plaintiff
 19 attested that, during the closed period, he was unable use his hands for housework, yardwork,
 20 exercise, or to play sports because they were numb, unsteady, and lacked coordination. AR 478-
 21 79, 482. He testified that the pain and numbness in his hands and fingers was the greatest

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 23 ⁸ The Commissioner also addresses the ALJ's evaluation of Plaintiff's testimony regarding his mental
 impairments and Plaintiff's other physical impairments. Dkt. 13 at 2-4. The Court, however, limits its
 consideration to the testimony challenged by Plaintiff.

1 physical barrier to his working. AR 65-67. Plaintiff estimated his pain to be approximately 9-10
 2 on a scale of one to ten. AR 70.

3 In the February 2023 decision currently at issue, the ALJ found that Plaintiff's "medically
 4 determinable impairments could reasonably be expected to cause the alleged symptoms" but that
 5 his "statements concerning the intensity, persistence, and limiting effects of the[] symptoms
 6 [were] not entirely consistent with the medical evidence and other evidence in the record," and
 7 no affirmative evidence of malingering. AR 23-24. Accordingly, the ALJ was required to
 8 provide "specific, clear and convincing reasons" for rejecting Plaintiff's testimony concerning
 9 the intensity, persistence, and limiting effects of his symptoms. *Tommasetti v. Astrue*, 533 F.3d
 10 1035, 1039 (9th Cir. 2008) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996));
 11 *accord Smartt v. Kijakazi*, 53 F.4th 489, 499 (9th Cir. 2022) (confirming that the "clear and
 12 convincing" standard continues to apply).

13 The ALJ provided two reasons for rejecting Plaintiff's testimony pertinent to his hand
 14 pain and numbness, including: (1) inconsistency with the evidence as a whole; and (2) evidence
 15 regarding Plaintiff's inconsistent statements to medical providers concerning his alcohol use.
 16 AR 23-24. In support of the first reason, the ALJ cited several sub-reasons or findings that the
 17 Court has already addressed above in conjunction with the ALJ's evaluation of the challenged
 18 medical opinion evidence. Those included findings that Plaintiff's grip strength, muscle
 19 strength, and sensation were intact, and that his care for elderly in-laws undermined his
 20 testimony. AR 24. Additionally, the ALJ also found that "despite his physical impairments,
 21 [Plaintiff] did not allege physical impairments in his function report." AR 24 (citing AR 438).

22 The ALJ, however, overlooked Plaintiff's April 2021 function report in conjunction with
 23 his findings. AR 478-84. As discussed above, that function report indeed described Plaintiff's

1 physical impairments, including his hand issues, their symptoms, and associated limitations. *See*
2 AR 478-84. Additionally, for all of the reasons already stated above, the ALJ conflated medical
3 observations regarding Plaintiff's grip strength with his hand pain and numbness. Moreover, the
4 ALJ failed to adequately explain how the select few treatment notes regarding Plaintiff's grip
5 strength and sensation from Plaintiff's hospitalizations for alcohol withdrawal undermined his
6 testimony and outweighed medical opinions and evidence to the contrary regarding his hand pain
7 and numbness. *See* AR 13 (citing AR 974, 1501, 1426). Finally, again, the evidence cited by the
8 ALJ does not show that Plaintiff cared for his elderly in-laws, let alone cared for them in a
9 manner that would have undermined his testimony regarding his hand pain and numbness. Thus,
10 these were not clear and convincing reasons for rejecting Plaintiff's testimony as to his hand
11 numbness and pain.

12 The ALJ, however, additionally cited to evidence that Plaintiff "minimized the frequency
13 and severity of his alcohol use during the consultative medical evaluation and VA primary care
14 consultation," thus "undermin[ing] the overall reliability of [Plaintiff's] allegations." AR 24
15 (citing AR 870-71, 1003, 1014, 1017, 1075, 2005, 1201, 1488-90, 1663, 1769, 1796). In the
16 evidence cited by the ALJ, Plaintiff acknowledged to medical providers and addiction counselors
17 that his "constant recurrence of drinking" was his "biggest problem," and that he has engaged in
18 binge drinking, which itself resulted in multiple hospitalizations over the years. AR 1588-90,
19 1663. Plaintiff explained that he does "not even really enjoy drinking, . . . it's just the numbing
20 effect." AR 1590; *see also* AR 1769, 1796 (Plaintiff describes the relationship between his
21 mental and physical impairments, service in the Gulf War, and his binge drinking). However,

1 Plaintiff also, at times, minimized his use of alcohol and even denied drinking in a consultative
 2 examination with Dr. Wingfield.⁹ *See* AR 1003.

3 Plaintiff argues that the ALJ was not permitted to make general credibility findings based
 4 on his inconsistent statements regarding alcohol abuse under Social Security Ruling (“SSR”) 16-
 5 3p. Dkt. 14 at 6 (citing SSR 16-3p, *Titles II and XVI: Evaluation of Symptoms in Disability*
 6 *Claims*, 2016 WL 1119029 (March 2016)). The Commissioner, by contrast, contends that the
 7 ALJ was entitled to find that Plaintiff’s lack of candor regarding his alcohol use impacted his
 8 description of his physical pain and other symptoms. Dkt. 13 at 4 (citing *Thomas*, 278 F.3d at
 9 959).

10 The Ninth Circuit has held that, in “determin[ing] whether the claimant’s testimony
 11 regarding the severity [his] symptoms is credible, the ALJ may consider . . . ordinary techniques
 12 of credibility evaluation,” including a “claimant’s reputation for lying, prior inconsistent
 13 statements concerning the symptoms, and other testimony by the claimant that appears less than
 14 candid.” *Smolen*, 80 F.3d at 1284. The Ninth Circuit has also held that inconsistent statements
 15 concerning drug or alcohol use can constitute specific, clear, and convincing reasons for
 16 rejecting a claimant’s testimony. *See Thomas*, 278 F.3d at 959 (holding that “[t]he ALJ gave
 17 specific, clear and convincing reasons for discounting [the claimant’s] testimony,” including that
 18 the claimant “had not been a reliable historian, presenting conflicting information about her drug
 19 and alcohol usage”). Like the claimant in *Thomas*, here, too, Plaintiff gave conflicting
 20 information about his alcohol use to Dr. Wingfield. *See* AR 1003. Accordingly, the Court

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 22
 23 ⁹ Dr. Wingfield acknowledged that his own review of Plaintiff’s medical records revealed that Plaintiff
 had failed to mention hospitalizations for “alcohol related delirium and withdrawal.” AR 1003.
 Accordingly, Dr. Wingfield was aware of Plaintiff’s alcohol use at the time he drafted his opinion.

1 concludes that the ALJ provided a specific, clear, and convincing reason to discredit Plaintiff's
2 symptom testimony regarding his hand pain and numbness.

3 **C. Remedy**

4 Plaintiff requests remand for an immediate award of benefits, arguing that the record is
5 complete, two hearings have already been conducted, and that crediting the improperly rejected
6 opinions from Drs. Golovaty, Staley, and Harmon requires a finding of disability. Dkt. 10 at 16-
7 17 (citing AR 90-91). Plaintiff further contends that this case "presents a rare exception to the
8 'ordinary remand' rule," and that remand to give the ALJ yet another opportunity to revisit
9 Plaintiff's RFC would "create an unfair 'heads we win; tails let's play again'" situation. Dkt. 10
10 at 17; Dkt. 14 at 8.

11 The Commissioner counters that remand for further administrative proceedings is the
12 appropriate remedy, suggesting without elaboration or explanation that there are outstanding
13 issues such that further proceedings would be useful. Dkt. 13 at 9. In reply, Plaintiff notes that
14 the Commissioner failed to describe any "meaningful conflicts" that remain. Dkt. 14 at 8.

15 Before remanding a case for an award of benefits, three requirements must be met. First,
16 the ALJ must have "'failed to provide legally sufficient reasons for rejecting evidence, whether
17 claimant testimony or medical opinion.'" *Brown-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir.
18 2015) (quoting *Garrison*, 759 F.3d at 1020). Second, the Court must conclude "'the record has
19 been fully developed and further administrative proceedings would serve no useful purpose.'" *Id.* In so doing, the Court considers the existence of "'outstanding issues'" that must be resolved
20 before a disability determination can be made. *Id.* (quoting *Treichler*, 775 F.3d at 1105). Third,
21 the Court must conclude that, "'if the improperly discredited evidence were credited as true, the
22

1 ALJ would be required to find the claimant disabled on remand.”” *Id.* (quoting *Garrison*, 759
 2 F.3d at 1021).

3 Here, the Court concludes that the first and third requirements have been satisfied. For
 4 the reasons above, the Court has found that the ALJ failed in his February 2023 decision to
 5 provide substantial evidence in support of his rejection of the opinions of Drs. Golovaty, Staley,
 6 and Harmon regarding Plaintiff’s likely absenteeism and Plaintiff’s manipulative limitations. In
 7 doing so, the ALJ committed the very errors previously noted by the Appeals Council in its
 8 January 2022 order remanding the case, failing again to “resolve the discrepancy” between the
 9 medical opinions and Plaintiff’s RFC, and, in many instances, failing to provide a sufficient
 10 “rationale with specific reference to evidence of record.” *See* AR 213-14. The ALJ’s
 11 declination on remand to request “additional evidence and/or further clarification” from the
 12 medical sources, as recognized by the Appeals Council, suggests that the ALJ determined that no
 13 further record development or clarification regarding the challenged opined limitations was
 14 warranted. *See* AR 213-14; *see also* AR 97-105 (ALJ notes at January 2023 hearing that he is
 15 “making an entirely new decision,” according to the Appeals Council’s remand order, and takes
 16 testimony from a new VE at the hearing). Furthermore, if Drs. Golovaty’s, Staley’s, and
 17 Harmon’s opined limitations were credited as true, Plaintiff would be rendered disabled *if this*
 18 *was not a case involving drug or alcohol use (“DAA”)*. *See* AR 90-91, 103-05 (VE’s testimony).

19 However, while the record was fully developed regarding the particular limitations
 20 opined to by Drs. Golovaty, Staley, and Harmon, Plaintiff (and the Commissioner) overlook the
 21 fact that this is indeed a DAA case. As such, further inquiry and proceedings are necessary to
 22 determine the materiality of Plaintiff’s alcohol dependence – an impairment the ALJ found to be
 23

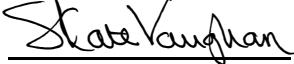
1 severe. AR 20; *see Parra v. Astrue*, 481 F.3d 742, 746-48 (9th Cir. 2007) (describing process
 2 utilized in DAA cases).

3 Because this is a DAA case, even after Drs. Golovaty's, Staley's, and Harmon's opinions
 4 are credited as true, the finding of disability following a "round one" sequential analysis does not
 5 warrant an immediate award of benefits. *See Parra*, 481 F.3d at 746-48. Instead, the ALJ must
 6 also engage in the "round two" DAA analysis, during which the ALJ considers the materiality of
 7 Plaintiff's alcohol dependence. *See id.* Here, the necessity of a further "round two" analysis
 8 thus constitutes an "outstanding" issue requiring further administrative proceedings. *See*
 9 *Garrison*, 759 F.3d at 1020. The Court therefore remands to the ALJ to conduct the "round two"
 10 proceedings required in this DAA case: a second application of the five-step sequential
 11 evaluation process to determine whether Plaintiff's alcohol dependence is "material" to a finding
 12 that he is disabled. *See Parra*, 481 F.3d at 746-48.

13 **CONCLUSION**

14 For the reasons set forth above, the Commissioner's final decision is **REVERSED** and
 15 this case is **REMANDED** for further administrative proceedings to determine the materiality of
 16 Plaintiff's alcohol dependence under sentence four of 42 U.S.C. § 405(g).

17 Dated this 12th day of February, 2024.

18 
 19

20 S. KATE VAUGHAN
 21 United States Magistrate Judge
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 23